STATE OF MICHIGAN

COURT OF APPEALS

DALE GALLAGHER,

Plaintiff-Appellant,

v

MONTCALM COUNTY and MICHIGAN EMPLOYMENT SECURITY COMMISSION,,

Defendant-Appellees.

UNPUBLISHED
August 17, 1999

No. 203429
Midland Circuit Court
LC No. 96-000348 AE

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM

Plaintiff appeals by leave granted from the trial court order affirming the Michigan Employment Security Commission (MESC) Board of Review's ruling that plaintiff was disqualified for unemployment compensation benefits. We affirm.

I

PROCEDURAL AND FACTUAL BACKGROUND

The procedural and factual history of this case is unique. Plaintiff was a building inspector for Montcalm County. On December 3, 1993, he was suspended for three days for, among other reasons, failure to properly report or start work after rest period and lunch breaks and falsification of time records, production records and county reports. On his first day back from work, plaintiff's spasmodic colon caused him to defecate uncontrollably while driving to work. Plaintiff returned home to clean himself up. Plaintiff then drove to work where he stopped briefly but did not speak or leave any written message with anyone. Plaintiff then proceeded to his daughter-in-law's office and left a message requesting that she call plaintiff's supervisor and report his absence. From there, plaintiff drove to a Veteran's Administration outpatient clinic where he was examined, treated and released with medication. Plaintiff admits his treating physician never told him he could not return to work.

On December 10, plaintiff mailed in his time card with the work "sick" written on it. Plaintiff's supervisor admitted that he received the time card and that on December 9 he received a message from plaintiff's daughter-in-law regarding defendant's illness. On December 13, defendant contacted plaintiff's daughter-in-law and asked her to have defendant call his supervisor. Plaintiff never personally contacted his supervisor, nor did he provide his supervisor with a medical verification. On December 17, defendant sent plaintiff a letter informing him that because of his failure to report to work, or to make personal contact or provide written clarification of his absence, he was considered to have voluntarily terminated his employment.

Plaintiff applied for unemployment benefits and was initially determined to be eligible. The employer requested and received a hearing which resulted in a decision reversing the MESC's original decision of eligibility. The referee found that plaintiff failed to keep the employer adequately informed as to why he was absent, and thus was guilty of misconduct pursuant to MCL 421.29(I)(b); MSA 17.531(1)(b).

Plaintiff sought review before the MESC Board of Review. The Board of Review affirmed the referee's decision on different grounds. In a 2-1 vote, the Board of Review found that plaintiff's failure to provide medical verification constituted statutory misconduct. The Board of Review denied rehearing by the same 2-1 vote.

Plaintiff then appealed to the Circuit Court. The Circuit Court affirmed the decision of the referee and the Board of Review. The Circuit Court disagreed with the Board of Review that the failure to provide medical verification constituted statutory misconduct. Nevertheless, the Circuit Court found that the decision was not contrary to law in that, as found by the referee, the failure to keep the employer adequately informed as to the reason for his absence constituted statutory misconduct. The Circuit Court concluded that based upon the whole record there was competent, material and substantial evidence to support the denial of benefits.

II

STANDARD OF REVIEW

In *Boyd v Civil Service Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996), this Court clarified the standard of review applicable to an appeal of a circuit court's review of an administrative agency decision. Pursuant to *Boyd*, we must review a lower court's application of the substantial evidence standard for clear error. *Id.* In *Boyd*, the Court reasoned that the clear error standard "will preserve scarce judicial resources, enhance the role of this Court as an intermediate appellate court, and discourage unnecessary appeals". *Id* The Court went on to hold:

> We find further support for adoption of the clear-error standard in our Supreme Court's recent amendment of MCR 7.203(A)(I) to provide for appeals by leave granted, rather than as of right, of judgments of lower courts that have reviewed agency action. While the amendment may have had several objectives, one clear import was to return primary review of agency fact finding to the court of direct review.

Under this standard of review we "must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Id.* This standard is synonymous with the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. *Id.* A finding is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.*

III

LEGAL ANALYSIS

Applying the clearly erroneous standard of review to the record developed in this case we are not left with a definite and firm conviction that a mistake has been made with regard to the conclusion that plaintiff's failure to contact his employer and to explain or substantiate his medical condition constituted misconduct under the statute.

In certain circumstances, an employee's failure to report to work on time may constitute statutory misconduct; at the same time, tardiness or absence which results from circumstances beyond the employee's control is not considered to be in wilful or wanton disregard of the employer's interest. *Washington v Amway Grant Plaza,* 135 Mich App 652, 658; 354 NW2d 299 (1984). Generally, the burden for demonstrating disqualification for unemployment benefits due to misconduct falls on the employer. *Veterans Thrift Stores, Inc v Krause,* 146 Mich App 366, 368; 379 NW2d 495 (1985). However, when "the relevant facts are entirely in the hands of the former employee and, for all practical purposes, cannot be discovered by the employer[,]" the burden is on the claimant "to provide a legitimate explanation for the absences." *Id.* In this case, plaintiff bore the burden of providing a legitimate explanation for the absences since the relevant facts were entirely within his hands.

Plaintiff claimed that his absences were due to illness and he submitted evidence that he had gone to an outpatient clinic on December 9, 1993, the first day he was to return to work after a three-day disciplinary suspension. However, plaintiff acknowledged that the doctor who treated him did not tell him he could not return to work. The evidence further showed that plaintiff had stopped by the building where he worked before going to the clinic, yet he did not bother to apprise anyone of his situation. Plaintiff did not personally contact his employer, but instead had his daughter-in-law call in for him on December 9. On December 10 neither plaintiff nor his daughter-in-law telephoned his employer. Instead, plaintiff mailed in his time card on which he indicated that he was taking sick leave for that day and the previous day. All these contacts occurred well after plaintiff's work shift had begun. There was no showing regarding when the time card was received by the employer. There was no contact by plaintiff on December 14, 15 and 16, and his employment was terminated on December 17, 1993.

An employer has a right to expect that its employees will be at their assigned work stations unless there is a valid reason for an absence. An employer also has a right to expect that its employees will provide appropriate notification of their reasons for an absence from work. Coming on the heels of a three-day disciplinary suspension, plaintiff's indirect and belated efforts to notify his employer of his

absences and his failure to contact his employer thereafter, constituted "disregard of standards of behavior which the employer has the right to expect of his employee" and "an intentional and substantial disregard of the employer's interests or the employee's duties and obligations to his employer." *Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961).

For these reasons, we find that the circuit court did not clearly err when it found that the board of review's decision was supported by "competent, material and substantial evidence on the whole record." Const 1963, art 6 § 28; MCL 421.38; MSA 17.540.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/